LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 9 1957
JOHN T. FEY, Clerk

No. 526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

GENERAL OUTDOOR ADVERTISING CO., INC.;
PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

CRAIG & GLASS
135 South LaSalle Street
Chicago 3, Illinois
Attorney for Petitioner.

November 6, 1957

TWENTIETH CENTURY PRESS, INC., CHICAGO 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 526

GENERAL OUTDOOR ADVERTISING CO., INC.,

PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The opposition brief of the United States, respondent herein, contains new matters related to the issues to which reply should be made.

PROPOSITION I (Pet. 6-10), (O. Br. 7, 8)

On the question of the validity of the amended claims for refund as proper amendments of the original claims, respondent says that they fail under the rule stressed in the petition, because the revenue agent engineer's report of March 3, 1950 (R. 33-34) did not require an ascertainment

of the value of the land and buildings, that even under the language of *Pink* v. *United States*, it is apparent that the court below could reasonably conclude that in his report, the engineer did not ascertain the value of land and buildings as a necessary part of his recommendation as to the merits of the original claims and that taxpayer is merely disagreeing with the court below on facts that carry varying interpretations of said report (O. Br. 7, 8). Respondent quibbles.

The revenue agent engineer was required to make a re-examination of the valuation of good will in connection with the original claims for refund, and in doing so was *required* to review the *value* of all physical assets that a valuation engineer would necessarily ascertain in his capacity. These assets did not include cash, accounts receivable and other current assets, but they did include real estate (land and buildings), advertising display plant (billboards); property subject to depreciation. It is plain from the report that he unavoidably ascertained the status of land and buildings, saying, "Notice was taken of this inflation of tangible assets in the examinations for 1936 and later years only insofar as it affected real estate, the only one on which the excess had not by that time been fully recovered as depreciation" (depreciation of buildings as part of real estate). "Notice" signifies the reduction in the value of land and buildings of $1,739,066.28 effected in the engineer's report of 11/5/43, which reduction was found by the lower court on the evidence of the appraised values, to be unjustified, and judgment was given accordingly. The facts pertaining to the value of land and buildings were thus ascertained by the Commissioner as early as November 5, 1943, and necessarily re-ascertained by the second engineer whose report of March 3, 1950 is referred to. (Court finding 9, R. 33-34)

The rule has here been fulfilled upon the investigation and ascertainment of both errors, land and buildings, and good will. There is, therefore, no reason why errors which do not affect the right of recovery, but only the amount of recovery, should be perpetuated. (*Red River Lumber Co.*, Pet. 10)

Taxpayer did not discard the basis for claiming increased good will, in claiming, by appropriate amended claims, the original appraised value of the land and buildings. (Pet. 7, *Andrews*), (Pet. 8, *Pink*)

The engineer, as will be seen from the report of March 3, 1950, recognized the inter-dependency of tangibles, including land and buildings, and intangibles; good will. Good will herein determined amounted to the excess earnings above 10% of the tangible assets, capitalized at 20% or 5 times the excess earnings; hence the necessity for ascertaining the value of all tangibles.

Respondent is stretching a point, when it argues that the said engineer, in reexamining the valuation of good will in connection with the original claims, did not base his conclusions on the facts above stated, which were the substance of his report as a valuation engineer.

In its decision, the lower court, in an opinion by Judge Whitaker, with Judge Littleton dissenting, failed to cite a single case in support of its conclusion that the amount of recovery on the judgment, arising from the restoration of the value of land and buildings, should be limited. Its decision on this issue conflicts with *Pink* and its own decisions. There is evident disagreement between members of the court on the principle involved or the result. This clearly erroneous decision would seem to call for some positive action by the Court.

PROPOSITION II (Pet. 11-13), (O. Br. 8, 9)

Question 2 presented by *respondent* (O. Br. 2) asserts the question to be one "to determine the value of good will acquired," which is contradicted by the statement at the top of page 4 of respondent's brief, reading as follows:

> "The transaction took the form of an acquisition of the stock of these companies rather than of assets. The valuation to be placed on the stock, as part of the invested capital of taxpayer, is the value of the underlying assets of the various companies (Pet. 4)."

Respondent has misstated the record (R.28) by failing to add "of companies" following "Fulton Group" at the bottom of page 3 of its brief. The *groups* were not incorporated and had no stock to be acquired. Stock of companies within the groups was acquired by plaintiff.

We are trying to determine in this case the value of certain property that was paid in—invested in—plaintiff for its stock which it exchanged for stock in separate companies. The basis for determining gain or loss upon the sale or exchange of such stock under Section 204(a) of the 1924 Revenue Act, 43 Stat. 253, was its fair market value as of February 26, 1925. It is correctly found by the lower court that the stock of the companies had no fair market value on February 26, 1925. Hence, the value of the stock of each of the separate companies was considered by the court to be equal to the value of its underlying assets, to which statement respondent subscribes. Therefore, under the literal, plain and unambiguous terms of Section 718(a)(2) the value of the underlying assets, including good will of the separate companies must be determined, in order for taxpayer to compute its equity invested capital and excess profits credit for 1944 and 1945.

Following the misconceived Question 2 presented, respondent, instead of properly treating the value of good will as an underlying asset of the separate companies, has stubbornly argued it should be determined on a corporation group basis as though good will of the separate companies had been transferred to taxpayer as of the basic date, February 26, 1925, which is not a fact. Respondent, while *recognizing* the *correct premise as quoted*, supra, persists in repeating throughout its brief, ambiguous and irrelevant terms, such as, "groups of companies", "other companies acquired", "companies acquired", "portion of the assets transferred to it", "valuation of a group of intangible assets", "group or groups of corporations acquired by another corporation", and "good will of the aggregate of the business acquired by taxpayer." Such repeated references do not change the facts, as quoted, supra, that respondent has admitted. It is not the value of *plaintiff's good will* that is here in issue but the *good will value underlying the stock of the companies.*

The fact that a number of the companies, but not all of them, were dissolved and liquidated and their assets transferred to taxpayer between 1925 and December 31, 1939, when a determination of taxpayer's invested capital was made for 1940, does not alter the requirement that the basis for determining gain or loss upon the sale or exchange of the stock of the separate companies acquired February 26, 1925 be properly ascertained, to determine taxpayer's equity invested capital and excess profits credit for the years 1944 and 1945 here involved.

When the good will of the companies is separately determined as required by Section 718(a)(2), it is found that all the companies had good will under the Government's own figures, except the Thomas Cusack Company, three of

its subsidiaries and the O. J. Gude Co., New York. Except for these five companies and five other companies which the Government omitted altogether, it determined the good will of the companies to total the sum of $3,217,700.

Respondent has not argued that the "negative" good will of $2,260,300 which was deducted from the above $3,217,700 to arrive at the net $957,400 was justified, except to say that "the effect of taxpayer's contention would be to overvalue the good will of the aggregate of the business acquired by taxpayer." (O. Br. 9.) Here again, the premise is in error —taxpayer acquired stock in separate companies, not their assets, nor the aggregate of a business.

Respondent has not taken issue with taxpayer's statement of the *general importance* of the "negative" or "minus" good will factor introduced by the Commissioner in the valuation of capital stock for invested capital purposes. The hypothetical example of the "Lady Ruth" corporation presented by taxpayer (Pet. 11, 12) must have impressed respondent. Furthering that example, if one of its stockholders died, there should be no doubt in the Court's mind that the Commissioner of Internal Revenue would be seeking an Estate Tax on the basis of the tangible net worth of $300,000 rather than the $60,000 reduced for the factor of "negative" good will. The same situation would obtain in the valuation of stock in "Lady Ruth" made the subject of a gift, with consequent Gift Tax. The Court should be mindful that the $240,000 difference in the net worth of "Lady Ruth" is exactly comparable to the $2,260,300 "negative" good will in taxpayer's case, which should be eliminated. Good will cannot go below zero. It is only positive in character. Here, as in the example, when negated, it serves to erroneously reduce the fixed value of tangible net worth. The lower court approved the value of all the

tangible assets of the separate companies on a finding of the Trial Commissioner, which the Government did not contest (O. Br. 6).

Respectfully submitted,

SPAULDING GLASS
135 South LaSalle Street
Chicago 3, Illinois
Attorney for Petitioner.